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No. 73-1489

In the
Supreme Court of the United States
October Term, 1973

CHARM PROMOTIONS, LTD.,
Petitioner,
vs.
THE TRAVELERS INDEMNITY COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The brief filed by Travelers sharply points up the reasons that the federal courts have consistently held it reversible error for a trial judge to give substantive instructions to the jury during their deliberations without notice and in the absence of counsel. The issue raised by Charm, which Travelers fails to discuss, compels reversal of the decision below.

Travelers does not dispute the critical fact that the Seventh Circuit's ruling conflicts with the Supreme Court's decision in *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76 (1919), and the decisions of the Third, Eighth and Tenth

Circuits. Instead, Travelers argues for affirmance on the ground that appellate review may only be "based upon matters presented in the trial court." (p. 3) The judgment below cannot be sustained, however, for the very reason that the trial judge improperly gave additional instructions to the jury *outside the record,* without notice to counsel, and failed to maintain any record of what occurred.

Travelers strongly complains that the verdict cannot be impeached by the affidavit of a juror regarding the reason that the jury made inquiry to the judge and the effect of the judge's reply upon their verdict.* This argument demonstrates the wrongness of the novel position adopted by the Seventh Circuit. It is not feasible, and ordinarily not proper, for litigants to attempt to determine the impact of outside influences upon the jury during their deliberations. Charm would not have undertaken to show the prejudice that in fact resulted from the *ex parte* instructions but for the Seventh Circuit's decision imposing that burden. This erroneous rule of law forces the losing party to secure all available facts regarding the circumstances and effect of improper conduct. Consequently, every jurisdiction which has considered this question, other than the Seventh Circuit, holds that such interference with the jury's function entitles a litigant to a new trial without respect to the prejudice caused.

Travelers mischaracterizes Charm's contention as being that *any communication* between the trial judge and the jury in the absence of counsel should invalidate the ver-

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* It should be noted that the Court of Appeals granted Charm leave to file the petition for rehearings which was based on the affidavit of Ruth Scheele. Judge Cummings voted to grant rehearing after the submission of the Scheele affidavit.

dict. On the contrary, the error in this case concerns the giving of *substantive* instructions to the jury during their deliberations. The federal decisions draw a clear distinction between instructions regarding issues in the case which compel reversal, and ministerial communications, such as occurred in *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), which may be excused depending on the particular circumstances.

For the reasons set forth in the Petition, this Court should grant certiorari to resolve the conflict created by the Seventh Circuit's decision. The logical necessity for a *per se* rule, and the overwhelming precedent holding that the circumstances in this case deprived Charm of a fair trial, makes summary reversal appropriate.

Respectfully submitted,

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